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ALEXANDER L. STEVAS,

No. 82-1053

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

LILLIAN M. HAAS, Personal Representative of the Estate of and parent and next of kin of John V. Cataldi, deceased; CHERYL RUFF, personal representative of the Estate of and widow of and next of kin of Edwin J. Ruff, Jr., deceased; BETTY LOU SCHLECTIC BAHE, as guardian and next friend of Ginger Schlectic, minor child of Ralph C. Schlectic, deceased; and JULIA KATHLEEN McDONALD LAMASCUS, personal representative of the Estate of and widow of and next of kin of Mark Lamascus, deceased; and JULIA KATHLEEN McDONALD LAMASCUS as guardian and next friend of Sarah Laine Lamascus and Mark David Lamascus, minor children of Mark Lamascus, deceased,

Appellants,

v.

UNITED TECHNOLOGIES CORPORATION, a Delaware corporation,

Appellee.

On Appeal from the Supreme Court of Delaware

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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ARGUMENT

THE QUESTIONS PRESENTED BY THIS APPEAL ARE SUBSTANTIAL AND THE RECORD BELOW AMPLY DEMONSTRATES APPELLANTS' CONSTITUTIONAL ATTACKS ON THE DELAWARE SPECIAL JURY STATUTE

In their Jurisdictional Statement Appellants presented four related questions for review by this Court: First, are the states constitutionally obliged to provide in civil

jury cases "an impartial jury drawn from a fair cross section of the community," *Thiel v. Southern Pacific Company*, 328 U.S. 217 (1946), as is required in all federal jury trials and in state criminal trials, *Peters v. Kiff*, 407 U.S. 493, 501 (1972)? Second, is the Delaware statute facially invalid under the Due Process and Equal Protection Clauses of the Fourteenth Amendment because it is available on demand without regard to case complexity and requires the deliberate and purposeful exclusion of otherwise qualified jurors from the special jury pool? Third, does the Delaware special jury system as applied to this case violate the Due Process and Equal Protection Clauses because the local jury commissioners adopted criteria for special jury service which required the intentional and purposeful exclusion of all persons under 30 and over 70 years of age or who had less than twelve years of formal education? And fourth, was the Delaware Supreme Court's decision ordering prospective relief only but denying relief to these litigants where it had previously found that Delaware special juries are "defense oriented" [1] and, *as applied in this case*, resulted in an "arbitrary," "potentially discriminatory," "statistically suspect" special jury panel,[2] in violation of the Equal Protection Clause? [3]

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[1] *Nance v. Rees*, 161 A.2d 795 (Del. 1960); *Robelen Piano Company v. DiFonzo*, 172 A.2d 568 (Del. 1961).

[2] The Delaware Supreme Court's description of the special jury practice as applied here is tantamount to a finding of a constitutional violation. And, the stated basis for ordering revision of these practices was "to comport with constitutional principles." A 24a.

[3] Equally important, the criteria the Delaware Supreme Court directed the trial court to use to promulgate rules for selection of special jurors themselves are constitutionally infirm because they direct exclusion of otherwise qualified jurors based solely on "age, occupation, intelligence and education (minimum of college degree)." Hence, the so-called prospective relief perpetuates the constitutional infirmities of the "as applied" arguments and does not correct Appellants' facial invalidity contentions.

In its Motion to Dismiss or Affirm dated January 20, 1983, Appellee United Technologies Corporation makes two basic arguments. First, Appellee argues that the questions presented are insubstantial because this Court has never before decided that the Fourteenth Amendment Equal Protection and/or Due Process Clauses require that state civil juries be drawn from a panel free from intentional exclusion and from a fair cross section of the community. Second, Appellee claims that even if (*arguendo*) the questions are substantial, they were not properly raised below and the record here is inadequate to support the appeal. Finally, Appellee attempts to argue the merits of this appeal by making points such as its previously rejected claims that a directed verdict should have been granted and that Appellants somehow "waived" their attack on the special jury.

None of the Appellee's arguments has merit.

A. The Questions Presented Are Substantial Because The Delaware Supreme Court Has Decided Important Questions Of Federal Constitutional Law Which Have Not Been, But Should Be, Settled By This Court And Has Decided Them In A Way That Departs From the Constitutional Norm For Jury Selection

Appellee argues that the questions presented here are not substantial, because this Court has never held invalid a state court civil jury trial based on the failure to comply with the "cross-section-of-the-community" standard as articulated in the *Thiel* and *Peters* cases.[4] With due deference to Appellee, that is precisely why the Appellants' first question *is* substantial. Since it cannot be

[4] Appellee also contends that state jury practices should not be overturned when not clearly violative of federal constitutional principles. We are not sure what purpose the modifier "clearly" serves, but no one disputes that this Court cannot overturn a state trial practice in the absence of a constitutional violation. The issue is whether such violations occurred. Appellee's argument therefore begs the question.

seriously questioned that the Fourteenth Amendment requires that minimum standards of fairness be afforded litigants in state civil jury trials,[5] is it not important to determine whether those minimum standards include the cross-sectionality of the jury panel as required by this Court in *Thiel* and *Peters*? Since this Court has not previously addressed that issue, it should do so now. This is especially so, because the Delaware Supreme Court's handling of this issue has resolved this important constitutional matter in a manner that departs from the constitutional norm for jury selections.

Appellee contends that "special juries have already been approved by decisions of this Court." But this argument begs the question, and only serves to highlight the substantiality of the question before this Court. As noted in Appellants' Jurisdictional Statement, this Court's last pronouncement on the constitutionality of the special jury system occurred some 35 years ago in *Fay v. New York*, 332 U.S. 261 (1947). Within the past three decades, more recent decisions by this Court[6] have severely eroded the constitutional rationale of *Fay*, rendering its continued viability at best suspect and making all the more necessary this Court's review of the questions presented here.

In any case, and as noted in Appellants' Jurisdictional Statement, page 18, n.12, *Fay* is not even controlling. The special jury statute at issue in *Fay* was available only after a judicial determination that such a jury was appropriate for the case before the court. Delaware's special jury, in stark contrast, is available to a litigant

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[5] *Peters v. Kiff*, 407 U.S. 493, 501 (1972) (regardless of the form of proceedings, due process requires impartiality and basic fairness); *Carter v. Jury Commissioners of Greene County*, 396 U.S. 320 (1970); *Maxwell v. Dow*, 176 U.S. 581, 605 (1900); *Walker v. Sauvinet*, 92 U.S. 90 (1876).

[6] *Taylor v. Louisiana*, 419 U.S. 552 (1975); *Duren v. Missouri*, 439 U.S. 357 (1979); *Peters v. Kiff*, 407 U.S. 493 (1972).

on demand without regard to case complexity, and affords the Delaware courts absolutely no discretion to determine in any particular case whether a special jury is appropriate.

B. The Questions Presented Here Were Raised Below And The Record Is Clearly Sufficient To Support This Appeal

Appellee next argues that the Appellants did not raise in the court below the questions herein presented. The argument is specious. First, the Delaware Supreme Court dealt at length with each of the issues raised in its two opinions, *see* A 14a-25a, 38a-49a, 74a-76a and see reported decision at 450 A.2d 1173, 1180-85 (Del. 1982). The Delaware Court did not indicate in either opinion that it considered the questions improperly raised or that there was any so-called "defect" in the record. Indeed, Appellee has misstated the facts: contrary to the statement appearing at pages 14 and 15 of Appellee's brief in support of its motion to dismiss, Appellants moved (without success) before trial for an order from the Delaware trial court prohibiting empaneling of the special jury. 116a-118a.

The record shows that without question Appellants pressed their Fourteenth Amendment objections to the Delaware special jury statute at all relevant stages. A 14a-25a, 38a-49a, 66a-73a, 74a-76a, 102a-103a, 114a-115a, 116a-119a, 120a-122a, 126a.

Appellee's contention that Appellants lack standing to complain of the "on demand" characteristic of the Delaware statute is similarly frivolous. The underlying claims presented in this case are no more complex than the ordinary products liability litigation handled by "non-special" juries in state and federal courts on a daily basis throughout the nation. Indeed, we would submit that this case is no more complicated than an automobile negligence claim. But, even if (*arguendo*) Appellee's

assertions that this case was "complex" are accepted,[7] Appellee's argument does not address, much less answer, the facial invalidity of the "on demand" aspect of the Delaware statute. On what basis can Appellee or anyone else claim that case complexity provides a justification for a special jury statute that is available on demand and without regard to the nature of the action? How can such a statute survive a challenge even under minimal "rational relation" review?[8] *Turner v. Fouche*, 396 U.S. 346, 362 (1970); *Reed v. Reed*, 404 U.S. 71 (1971); *Stanton v. Stanton*, 421 U.S. 7 (1975).

Appellee also suggests that the Delaware Supreme Court's prospective order that criteria of "age, occupation, intelligence, and education (minimum of a college degree)" be used for selection of future special juries is not in issue in this case. This argument misperceives the thrust of Appellants' position. The significance of these criteria is that the Delaware Supreme Court has approved for continued use the intentional and purposeful exclusion of otherwise qualified jurors based solely on age and educational requirements, the very criteria applied in this case. Thus, the Delaware court's prospective relief does not cure the constitutional infirmities complained of here.[9]

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[7] To support its claim of complexity Appellee declares: "A critical witness for appellants, Tannian, characterized this as an exceptional case" (Appellee's Brief, page 13). Tannian is an economist who testified on the subject of the decedents' lost earnings. It was "exceptional" only because there were four decedents.

[8] Appellants contend that litigants have a fundamental right to a fair and impartial jury selection process and, therefore, strict scrutiny should apply. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 16 (1973); *Bullock v. Carter*, 405 U.S. 134 (1972). But, even the minimum rationality standard cannot be met by this statute.

[9] Appellants also contend that the statute is invalid on its face because it *per se* is inconsistent with cross-sectionality requirements, excludes qualified "regular" jurors, and is available on demand.

Appellee's claim that Appellants failed to attack the procedure used here is nothing short of an outright misstatement. Even a cursory reference to Appellants' Motion to Prevent Impaneling of Special Jury (116a-119a) so establishes. Appellants further documented their claim and the record through the uncontroverted affidavit of the Court administrator, who stated that the practice used here purposefully and intentionally excluded jurors based on age and education. And, as to Appellee's claim that the record is deficient, the record establishes that Appellants submitted to the Delaware trial court and Delaware Supreme Court the juror questionnaires for the special jury panel drawn in this case. As noted at 115A, these questionnaires are part of the certified record in this case. They were not printed because of their voluminous nature and because the Court administrator's affidavit adequately summarizes them. To repeat, the Delaware Supreme Court does not indicate in either of its opinions that it considered the record deficient, nor did Appellee even make that contention to that court. The contention that the record is insufficient amounts to sophistry.[10]

Appellee's remaining arguments are, at best, frivolous, and, in any case, irrelevant to the jurisdictional questions before this Court at this stage. For instance, the claim that Appellee was entitled to a directed verdict is totally irrelevant and simply absurd. This argument

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[10] Despite Appellee's arguments to the contrary, the record as to exclusion based on age is likewise uncontroverted. The affidavit of the Court administrator indicates that the jury commissioners intentionally excluded persons over 70 and under 30 from the jury pool after October, 1980. A 121a. The special jury pool here contained some jurors placed in the special jury "box" both before and after October, 1980. The five names mentioned at page 17 of Appellee's argument of persons who were under 30 who were included in the pool were all placed there before October, 1980 but were discharged for cause during voir dire.

was made below and rejected *sub silentio* by the Delaware Supreme Court in its August 25, 1982 [11] opinion. The same is true for the Appellee's "waiver" claim based on Appellants' arguments to the jury. That contention was also briefed, argued, and rejected below. And, we note, the waiver argument met a particularly chilly reception at the December 18, 1981 oral argument before the Delaware Supreme Court when Justice McNeilly chided Appellee's counsel for even advancing the proposition.

The last point noted in Appellee's motion to dismiss is that this appeal was not taken in conformity with the Court rules because the Attorney General of the State of Delaware (who is not a party to this case) was not served under Supreme Court Rule 28.4(c). The Attorney General of the State of Delaware has now been served in accordance with such rule. Any such service error is not jurisdictional, *see, e.g., United States v. Adams*, 383 U.S. 39, 42 (1966); *Parker v. Levy*, 417 U.S. 733, 742, n.10 (1974), and does not serve as a ground for dismissal.

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[11] The argument was specifically rejected in the Delaware Supreme Court's now superseded March 15, 1982 opinion. 28a-37a.

CONCLUSION

For the reasons set forth in Appellants' Jurisdictional Statement and herein, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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